

## FORMAL OPINION NO 2005-167

[REVISED 2014]

### **Lawyer as Mediator: Attempted Fraud by One Party**

#### **Facts:**

Lawyer-Mediator is retained by parties to mediate a domestic relations matter. During the mediation, Party A discloses to the mediator the existence of assets that are unknown to Party B. Lawyer-Mediator knows that the assets are important to decision-making by Party B. Party A instructs Lawyer-Mediator to withhold these facts from Party B.

#### **Questions:**

1. May Lawyer-Mediator continue to mediate the matter to conclusion?
2. Does it make any difference if Lawyer-Mediator is unfamiliar with the substantive law of the matter?

#### **Conclusions:**

1. No.
2. No.

#### **Discussion:**

Oregon RPC 2.4 provides:

- (a) A lawyer serving as a mediator:
  - (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and
  - (2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.
- (b) A lawyer serving as a mediator:

(1) may prepare documents that memorialize and implement the agreement reached in mediation;

(2) shall recommend that each party seek independent legal advice before executing the documents; and

(3) with the consent of all parties, may record or may file the documents in court.

(c) The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

In light of Oregon RPC 2.4(a)(1), Lawyer-Mediator cannot have a lawyer-client relationship with a mediating party with respect to the mediation. Oregon RPC 2.4(a)(1) does not, however, prohibit Lawyer-Mediator from mediating a matter involving persons who are represented by Lawyer-Mediator in other separate matters.

Whether or not Lawyer-Mediator represents either of the parties on other matters, Lawyer-Mediator is bound by the applicable rules of professional conduct, including Oregon RPC 8.4(a)(3) (prohibiting “conduct involving dishonesty, fraud, deceit or misrepresentation”), Oregon RPC 8.4(a)(4) (prohibiting “conduct that is prejudicial to the administration of justice”), and Oregon RPC 3.3(a)(5) (prohibiting illegal conduct generally). Thus, a lawyer who is also a mediator cannot engage in a knowing misrepresentation or concealment of a material fact. *See, e.g., In re Williams*, 314 Or 530, 840 P2d 1280 (1992). It follows that Lawyer-Mediator cannot complete a mediation based in whole or in part on the fraud of a mediating party.<sup>1</sup>

At a minimum, Lawyer-Mediator must inform Party A that as a result of Party A’s nondisclosure, Lawyer-Mediator will be obligated to withdraw from the mediation. *Cf.* OSB Formal Ethics Op No 2005-34. Lawyer-Mediator may also go one step further and inform Party A that if Party A does not allow disclosure, Lawyer-Mediator will inform Party B that no further reliance should be placed on any statements that may

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<sup>1</sup> For a discussion of a lawyer’s duty when the lawyer’s client has lied in the course of a proceeding or intends to perpetrate a fraud, see OSB Formal Ethics Op No 2005-131 and OSB Formal Ethics Op No 2005-132.

therefore have been made to Party *B*. ABA Formal Ethics Op No 92-366.<sup>2</sup>

The remaining question is whether Lawyer-Mediator may go still further and inform Party *B* of the attempted fraud. ORS 36.220 provides:

- (1) Except as provided in ORS 36.220 to 36.238:
  - (a) Mediation communications are confidential and may not be disclosed to any other person.

Unless the disclosure falls within a statutory exception, the mediator is bound to keep the communication confidential. The exceptions include communications that the mediator or a party reasonably believes must be disclosed “to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a specific person.” ORS 36.220(6). Neither this exception nor any other exception permits disclosure to prevent a commercial or monetary fraud. Alternatively stated, the mediation privilege statute lacks the broad exception for future criminal conduct of all types that is contained in Oregon RPC 1.6(b)(1) (permitting disclosure of a client’s “intention . . . to commit a crime and the information necessary to prevent the crime”). In other words, Lawyer-Mediator may not disclose Party *A*’s intended fraud. *Cf. Rojas v. Superior Court*, 33 Cal 4th 407, 93 P3d 260 (2004) (declining to create exception to parallel California statute when legislature did not create one).

We reject the argument that Lawyer-Mediator could make the disclosure if, in fact, Party *A* happened to be a client in one or more other matters. At least in the absence of contrary holdings by courts of competent jurisdiction, the statutory nondisclosure obligation appears to

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<sup>2</sup> In the context of a lawyer-client relationship, this kind of withdrawal-plus-disclaimer is known as a “noisy withdrawal.” *See, e.g.*, ABA Formal Ethics Op No 92-366; *The Ethical Oregon Lawyer* § 21.4-1 (duration of duty to correct a misunderstanding), § 21.7 (preventing clients from cheating or defrauding others) (OSB Legal Pubs 2015).

us to predominate over the right of permissive disclosure contained in Oregon RPC 1.6(b)(1).

**Approved by Board of Governors, April 2014.**

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COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* chapter 21 (negotiation ethics); *Restatement (Third) of the Law Governing Lawyers* §§ 94, 130 (2000) (supplemented periodically); and ABA Model RPC 2.4.